

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

California Rules of Court, rule 8.1115(a), prohibits courts and parties from citing or relying on opinions not certified for publication or ordered published, except as specified by rule 8.1115(b). This opinion has not been certified for publication or ordered published for purposes of rule 8.1115.

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SIX

THE PEOPLE,

Plaintiff and Respondent,

v.

DEDAN BOYD,

Defendant and Appellant.

2d Crim. No. B214388
(Super. Ct. No. SA066827)
(Los Angeles County)

Dedan Boyd appeals the judgment entered after a jury convicted him of selling a controlled substance (Health & Saf. Code, § 11352, subd. (a)). In a bifurcated proceeding, the trial court found that appellant had a prior drug conviction (Health & Saf. Code, § 11370.2, subd. (a)) and one prior strike conviction (Pen. Code, §§ 667, subds. (b)-(i), 1170.12, subds. (a)-(d)). He was sentenced to a total term of 11 years in state prison. He contends the court abused its discretion in partially denying his *Pitchess*¹ motion. We affirm.

FACTS AND PROCEDURAL HISTORY

Prosecution

On December 20, 2007, Los Angeles Police Officer Brent Olsen was working undercover in Venice as part of a long-term narcotics investigation referred to as

¹ *Pitchess v. Superior Court* (1974) 11 Cal.3d 531.

the "Oakwood Project." At about 3:15 p.m., Officer Olsen was riding his bicycle near Broadway and Sixth Avenue when he saw appellant step into the street and wave at him. The officer approached appellant and asked if he was "working," a street term for selling drugs. Appellant asked "how much [he] needed," and the officer responded "an eighth," which meant an eighth of an ounce. Appellant removed a bindle from his waistband and handed Officer Olsen what appeared to be several rocks of cocaine base. Officer Olsen handed appellant \$100, then rode away on his bicycle.

Los Angeles Narcotics Detective Roger Gilbert was in an unmarked car about 50 feet away and observed Officer Olsen approach appellant. After the transaction was completed, Officer Olsen broadcast appellant's description and location to Detective Gilbert, who relayed the information to other officers. Uniformed Los Angeles Police Officer Joseph Terena and his partner Officer Dressen subsequently detained appellant, took his photograph, and created a field identification card. Appellant was then released in accordance with the ongoing investigation. Officer Olsen explained, "[w]e don't ever arrest defendants immediately, we do what are called dead buys, sometimes they call them buy walks. We attempt to penetrate the neighborhood." The officer added: "When I go into a neighborhood I try to make a narcotics purchase from one individual, I try to be seen by other people who might sell narcotics, and then we don't arrest the individual that we just bought from so that I can go back possibly the next day or the next week and buy from other individuals. [¶] It gives me a form of street credence that if I bought narcotics from one person and he wasn't arrested I can go back and they are not going to get arrested, therefore they will sell me narcotics."

The rocks appellant sold to Officer Olsen were later tested and found to contain .80 grams of cocaine base. On February 13, 2008, appellant was arrested during a "takedown" of all the suspects who had sold drugs to undercover officers over the course of the investigation.

Los Angeles Gang Detective Freddy Lilomaiaava, a member of the task force on the Oakwood Project, testified as a gang expert on behalf of the prosecution. Appellant sold the cocaine to Officer Olsen in an area controlled by the Venice Shoreline

Crips, a criminal street gang whose members engage in cocaine sales and other crimes. Detective Lilomaiva concluded that appellant was a member of the gang based on his own admissions, his tattoos, and the area where he was "hanging out" when the sale took place. When presented with a hypothetical based on the facts of the case, the detective opined that appellant had sold the cocaine for the benefit of his gang.

Defense

Appellant testified in his defense. He admitted becoming a member of the Venice Shoreline Crips when he was 10 or 11 years old. He later moved to Lancaster and went to jail for committing a carjacking. Upon his release, he moved to Chicago and committed more crimes. He moved back to Los Angeles when he was 18 or 19 years old. When he was 21, he was sent to prison for possession of a controlled substance and for violating his probation on a prior attempted burglary conviction. Two days after his release, he was arrested in Venice for selling cocaine and was sent back to prison. He then stopped associating with the Venice Shoreline Crips because his brother told him that members of the gang had turned the brother in to the police for committing another crime.

In December 2007, appellant was on parole and living in general relief housing in North Hollywood. On December 20, he went to Venice to visit a girlfriend. As he was walking down Broadway, Officer Terena pulled up in a police car along with another officer. Officer Terena asked appellant if he was on parole, and he verified that he was. When the officer asked if he was a member of the Venice Shoreline Crips, he said no. The officers proceeded to search appellant, then took his photograph and created a field identification card. They let him go after telling him that they were just conducting a routine stop to identify any gang members in the area. A few weeks later, appellant was at a park in Venice when the police searched and photographed him again. On February 13, 2008, he was stopped for littering on the sidewalk. The police arrested him after discovering he had a warrant for failing to notify his parole officer of his current address. It was not until a few days later that appellant learned he was being charged with selling cocaine to Officer Olsen.

Rebuttal

On the afternoon of December 20, 2007, Los Angeles Narcotics Detective Christopher Delatorre observed Officer Olsen as he rode his bicycle away from an individual on Broadway and Sixth Avenue and received information that the suspect had a tattoo on his neck and was wearing a gray and black jacket. The detective continued to watch the individual until Officer Terena and his partner arrived and took photographs of him.

DISCUSSION

Prior to trial, appellant filed a *Pitchess* motion seeking discovery of information from the personnel files of Officers Olsen and Dressen and Detectives Delatorre, Lilomaiaava, and Gilbert. The court found that appellant had made the requisite showing of good cause only as to Officer Olsen, and summarily denied the motion as to the others. After conducting an in camera review of Officer Olsen's records, the court found some of the information discoverable and provided it to the defense. Appellant contends the court abused its discretion in denying the motion as to Detectives Delatorre, Lilomaiaava, and Gilbert (hereinafter collectively referred to as the detectives) without first conducting an in camera review of their personnel records.² We disagree.

Background

In his *Pitchess* motion, appellant sought all complaints made against Officer Olsen and the detectives concerning "acts of aggressive behavior, violence, excessive force, or attempted violence or excessive [*sic*], racial bias, gender bias, ethnic bias, sexual orientation bias, coercive conduct, violation of constitutional rights, fabrication of charges, fabrication of evidence, fabrication of reasonable suspicion and/or probable cause, illegal search/seizure[,], false arrest, perjury, dishonesty, writing of false police reports, writing of false police reports to cover up the use of excessive force, planting of evidence, false or misleading internal reports including but not limited to false

² Appellant does not challenge the court's denial of his *Pitchess* motion as to Officer Dressen.

overtime or medical reports, and any other evidence of misconduct amounting to moral turpitude within the meaning of *People v. Wheeler* (1992) 4 Cal.4th 284"

In support of the motion, counsel submitted a declaration stating in pertinent part: "Based upon information and belief Officer Olsen claims defendant sold him a small quantity of cocaine for \$100.00. Officer De La Torre claims he thereafter 'monitored' the defendant until chase unit Officers Terana and Dressen detained defendant. Defendant was 'identified[,] photographed, and released at the scene. . . . Officer Lilomaiva contends that defendant is an active gang member who he had seen a few days or weeks before this incident associating with gang members and that this alleged sale was for the benefit of a gang. [¶] I am further informed and believe that this 'sale' never occurred. Defendant was stopped, searched, and photographed. No drugs, 'buy money[,] or other contraband was recovered. The police thereafter utilized Officer Lilomaiva [*sic*] to 'confirm' defendant was 'an active gang member[.]' In February 2008, Defendant, as well as over fifty other alleged gang members in the Venice area were 'swept up' by the police, arrested, and charged with narcotics crimes all done for the benefit of the gang. [¶] The officers listed above fabricated this incident as a pretext to remove what they perceived to be gang members from the Venice community. Their bias and prejudice toward those who they deem to be gang members has contributed to their willingness to engage in unlawful acts and other forms of police misconduct."

The prosecution filed opposition to the motion. After hearing argument, the court summarily denied the motion as to all except Officer Olsen, reasoning as follows: "First of all, again this is one of those boilerplate motions that throws everything into the mix for the court to consider. I don't find there's any evidence that would warrant any in-camera review relating to acts of aggressiveness, violence, excessive force, racial gender, ethnic or sexual orientation, bias, coercive conduct, it falls – well, perjury, dishonesty, false reports maybe. As far as the officers go, Officer De La Torre [*sic*], I find no basis, based on his purported role in the investigation here, to warrant any in-camera review. The same goes for Officer Dressen, same for Officer Lilomaiva, and Detective Gilbert. I find nothing to support any further in-camera

review . . . related to any of those officers. The only factual basis that would warrant an in-camera review, in my opinion, would be as to Officer Olsen, related to false arrest, perjury, dishonesty, false reports, fabrication of charges and evidence."

General Legal Principles and Standard of Review

"[O]n a showing of good cause, a criminal defendant is entitled to discovery of relevant documents or information in the confidential personnel records of a peace officer accused of misconduct against the defendant. (Evid. Code, § 1043, subd. (b).) Good cause for discovery exists when the defendant shows both "'materiality" to the subject matter of the pending litigation and a "reasonable belief" that the agency has the type of information sought.' [Citation.] A showing of good cause is measured by 'relatively relaxed standards' that serve to 'insure the production' for trial court review of 'all potentially relevant documents.' [Citation.] If the defendant establishes good cause, the court must review the requested records in camera to determine what information, if any, should be disclosed. [Citation.]" (*People v. Gaines* (2009) 46 Cal.4th 172, 179.)

"In *Warrick v. Superior Court* (2005) 35 Cal.4th 1011, our Supreme Court discussed the elements of a good cause showing of materiality. Defense counsel must file a declaration that 'describe[s] a factual scenario supporting the claimed officer misconduct. That factual scenario, depending on the circumstances of the case, may consist of a denial of the facts asserted in the police report.' [Citation.] '[T]he trial court . . . will have before it defense counsel's affidavit, and in addition a police report, witness statements, or other pertinent documents. The court then determines whether defendant's averments, "[v]iewed in conjunction with the police reports" and any other documents, suffice to "establish a plausible factual foundation" for the alleged officer misconduct and to "articulate a valid theory as to how the information sought might be admissible" at trial. [Citation.] . . . What the defendant must present is a specific factual scenario of officer misconduct that is plausible when read in light of the pertinent documents. [Citations.]' [Citation.] '[A] plausible scenario of officer misconduct is one that might or could have occurred. Such a scenario is plausible because it presents an assertion of specific police misconduct that is both internally consistent and supports the defense

proposed to the charges.' [Citation.]" (*People v. Galan* (2009) 178 Cal.App.4th 6, 11-12.)

"A trial court's decision on the discoverability of material in police personnel files is reviewable under an abuse of discretion standard. [Citation.] [Citation.] 'A trial court abuses its discretion when its ruling "fall[s] 'outside the bounds of reason.'" [Citation.] [Citation.]" (*People v. Galan, supra*, 178 Cal.App.4th at p. 12.)

Analysis

The court did not abuse its discretion in summarily denying appellant's *Pitchess* motion as to Detectives Delatorre, Gilbert, and Lilomaiaava because it could reasonably conclude that appellant had failed to provide a plausible factual scenario of misconduct on their part. Counsel's declaration alleges that all three detectives conspired with Officer Olsen to "fabricate[] th[e] incident as a pretext to remove what they perceived to be gang members from the Venice community." There was no evidence or allegation, however, that any of the detectives claimed they had witnessed appellant selling drugs to Officer Olsen. Counsel merely stated on information and belief that appellant had not sold cocaine to Officer Olsen. He did not dispute that Officer Olsen had contacted him on the street and asked him for drugs, or that Detective Delatorre had thereafter monitored him until he was stopped and photographed by Officers Terena and Dressen.

There are no allegations at all as to Detective Gilbert. Officer Olsen's narrative in the police report states that he "was wearing a one-way transmitting body wire that Detective Gilbert . . . was monitoring," yet there was no statement or allegation that the detective actually observed the transaction. To the extent appellant complains the court precluded him from establishing this fact when the detective testified at the preliminary hearing, this perceived obstacle did not prevent appellant from providing a plausible explanation as to how the detective's role in the investigation rendered information in his personnel records relevant to appellant's defense.

With regard to Detective Lilomaiaava, counsel's declaration states he was prepared to testify "that [appellant] is an active gang member who he had seen a few days

or weeks before this incident associating with gang members and that this alleged sale was for the benefit of a gang." Counsel does not, however, deny that appellant was in fact a member of the Venice Shoreline Crips gang, or that Detective Lilomaiva had seen him associating with fellow gang members shortly before the crime took place. As for the detective's conclusion that the drug sale was for the benefit of appellant's gang, that conclusion is an expert opinion based on hypothetical facts. There is no evidence or allegation that Detective Lilomaiva had or claimed to have personal knowledge of the facts giving rise to appellant's arrest and prosecution for selling cocaine to Officer Olsen. In light of these deficiencies, the court could reasonably conclude that appellant had failed to establish good cause for the discovery of the detective's personnel files.

The defendant in *People v. Thompson* (2006) 141 Cal.App.4th 1312, was also charged with an undercover drug sale that was monitored by several other officers. The defendant filed a *Pitchess* motion seeking the personnel records of all 11 officers and detectives who were involved in the transaction, on the allegation that they had conspired to fabricate the charges against him. His attorney's declaration alleged that the "officers saw defendant and arrested him because he was in an area where they were doing arrests" and fabricated the charges after discovering his criminal history. (*Id.* at p. 1317.) The declaration further stated that the charges were "a fabrication manufactured by the officers to avoid any type of liability for their mishandling of the situation and to punish the defendant for being in the wrong area, at the wrong time and for having a prior criminal history." (*Ibid.*) In affirming the trial court's summary denial of the motion, we reasoned among other things that the defendant "does not state a non-culpable explanation for his presence in an area where drugs were being sold, sufficiently present a factual basis for being singled out by the police, or assert any 'mishandling of the situation' prior to his detention and arrest." (*Ibid.*)

The declaration of appellant's counsel is similarly lacking. Paraphrasing *Thompson*, appellant's *Pitchess* motion "does not provide an alternate version of the facts regarding his presence and his actions prior to and at the time of his arrest. He does not explain the facts set forth in the police report. In essence, his declaration claims that the

entire incident was fabricated and, by inference, that the police officers conspired to do so in advance." (*People v. Thompson, supra*, 141 Cal.App.4th at p. 1318.) In deciding whether in camera review of an officer's personnel records is required, courts are permitted "to apply common sense in determining what is plausible, and to make determinations based on a reasonable and realistic assessment of the facts and allegations." (*Id.* at pp. 1318-1319.) The common sense approach employed by the court here does not amount to an abuse of discretion.³

The judgment is affirmed.

NOT TO BE PUBLISHED.

PERREN, J.

We concur:

YEGAN, Acting P.J.

COFFEE, J.

³ Appellant's reliance on *Kelvin L. v. Superior Court* (1976) 62 Cal.App.3d 823, is misplaced. The court in that case held that a defendant charged with committing battery against a police officer was entitled to discovery relating to the other arresting officer who witnessed the alleged crime. (*Id.* at p. 828.) In reaching that conclusion, the court reasoned that evidence of the other officer's misconduct was "relevant to an investigation of the incident and preparation of a defense." (*Ibid.*) As we have noted, appellant failed to explain how the prior misconduct of detectives who did not actually witness appellant commit the crime with which he was charged was relevant to his case or the preparation of his defense.

Robert P. O'Neill, Judge
Superior Court County of Los Angeles

California Appellate Project, Jonathan B. Steiner, Executive Director, Ann Krausz, Attorney, under appointment by the Court of Appeal, for Defendant and Appellant.

Edmund G. Brown Jr., Attorney General, Dane R. Gillette, Chief Assistant Attorney General, Pamela C. Hamanaka, Senior Assistant Attorney General, Steven D. Matthews, Supervising Deputy Attorney General, Herbert S. Tetef, Deputy Attorney General, for Plaintiff and Respondent.